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SENATE

REPORT
99-447

THE POLYGRAPH PROTECTION ACT OF 1985

SEPTEMBER 17 (legislative day, SEPTEMBER 15), 1986.—Ordered to be printed

Mr. HATCH, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1815]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1815), having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. THE BILL AS REPORTED

S. 1815

A BILL To prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers involved in or affecting interstate commerce

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Polygraph Protection Act of 1985".

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S543-22

PURPOSE

SEC. 2. (a) PURPOSE.—It is the purpose of this Act to prevent the denial of employment opportunities based on the use of lie detectors designed to detect deception or verify the truth of statements.

(b) CONSTRUCTION.—This Act shall be construed to prohibit the use of all such lie detectors on any employee, agent, prospective employee, and prospective agent.

PROHIBITION ON LIE DETECTOR USE

SEC. 3. No employer or any other person engaged in or affecting interstate commerce, nor any agent or representative thereof—

(1) may directly or indirectly require, request, suggest, permit or cause any employee, agent, prospective employee, or prospective agent to take or submit to any lie detector test or examination for any purpose;

(2) may use, accept, or refer to the results of any lie detector test or examination of any employee, agent, prospective employee, or prospective agent for any purpose; or

(3) may—

(A) discharge, dismiss, discipline in any manner, or deny employment or promotion to; or

(B) threaten to discharge, dismiss, discipline, or deny employment or promotion to,

any employee, agent, prospective employee, or prospective agent who refuses, declines, or fails to take or submit to any lie detector test or examination.

NOTICE OF PROTECTION

SEC. 4. (a) NOTICE OF PROTECTION.—The Secretary of Labor shall prepare and have printed a notice setting forth information necessary to carry out the purpose of this Act.

(b) POSTING REQUIRED.—The notice required by this section shall be posted at all times in conspicuous places upon the premises of every employer engaged in any business in or affecting interstate commerce.

RULES AND REGULATIONS

SEC. 5. In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the Secretary of Labor shall issue such rules and regulations as may be necessary or appropriate to carry out this Act.

AUTHORITY OF THE SECRETARY OF LABOR

SEC. 6. The Secretary of Labor shall—

(1) make such delegations, appoint such agents and employees, and pay for such technical assistance on a fee for service basis, as the Secretary deems necessary to assist in carrying out the functions prescribed by this Act;

(2) cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employ-

ers, labor organizations, and employment agencies to aid in carrying out the purpose of this Act; and

(3) make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209 and 211).

ENFORCEMENT PROVISIONS

SEC. 7. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16, and 17 of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(b), 216, and 217). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938 (29 U.S.C. 216 and 217).

EXEMPTIONS

SEC. 8. The provisions of this Act shall not apply with respect to—

(1) any individual who is employed by the United States Government, a State government, city, or any political subdivision of a State or city; or

(2) personnel of contractors of the Department of Defense with access to classified information.

Personnel described in clause (2) may be subject to the polygraph program authorized in the Department of Defense Authorization Act, 1986.

DEFINITIONS

SEC. 9. As used in this Act—

(1) the term "person" means any natural person, firm, association, partnership, corporation, or any employee or agent thereof;

(2) the term "lie detector" includes but is not limited to any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical, electrical, or chemical) which is used, or the results of which are used, for the purpose of detecting deception or verifying the truth of statements; and

(3) the term "employer" includes an employment agency.

EFFECTIVE DATE

SEC. 10. The provisions of this Act shall take effect on the date of enactment of this Act, except that the provisions of section 4 shall take effect six months after the date of enactment of this Act.

II. SUMMARY OF THE BILL

PURPOSE

The purpose of the bill is to prevent the denial of employment opportunities based on the use of any lie detector, including but not

limited to any polygraph, deceptograph, voice stress analyzer, psychological stress analyzer, or any other similar device (whether mechanical, electrical, or chemical) which is used, or the results of which are used, for the purpose of detecting deception or verifying the truth of statements.

SUMMARY

S. 1815, the Polygraph Protection Act of 1985, would do the following:

A. Prohibit any employer or person engaged in or affecting interstate commerce from directly or indirectly requiring, requesting, suggesting, permitting or causing any employee, agent, prospective employee or prospective agent to take or submit to any lie detector test for any purpose;

B. Prohibit any employer or person engaged in or affecting interstate commerce from using, accepting or referring, for any purpose, to the results of any lie detector test of any employee, agent, prospective employee or prospective agent;

C. Prohibit any employer or person engaged in or affecting interstate commerce from discharging, dismissing, disciplining or denying employment or promotion; or threatening any of these acts; to any employee, agent, prospective employee or prospective agent who refuses, declines, or fails to take or submit to any lie detector test;

D. Require the Secretary of Labor to post a notice of the effects of this Act on the premises of every employer in any business in or affecting interstate commerce;

E. Require the Secretary of Labor to promulgate rules and regulations necessary to carry out the Act;

F. Require the Secretary of Labor to take such actions as he deems necessary to carry out the functions of the Act;

G. Require the Secretary of Labor to cooperate with regional, state, local and other agencies and provide technical assistance to employers, labor organizations, and employment agencies in carrying out the purpose of the Act;

H. Require the Secretary of Labor to investigate and keep necessary and appropriate records for the administration of the Act in acordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938;

I. Require the Secretary of Labor to enforce the Act in accordance with the powers, remedies, and procedures provided in sections 11(b), 16, and 17 of the Fair Labor Standards Act of 1938;

J. Exempt employees of federal, state, and local governments, or any subdivision thereof, and exempt the employees of contractors of the Department of Defense with access to classified information from the provisions of the Act;

K. Define the terms "person", "lie detector", and "employer"; and

L. Establish the effective date of the Act as the date of enactment, except for section 4, which would become effective six months after the date of enactment.

III. Background and Committee Views

A. BACKGROUND

Within the last ten years, use of the polygraph examination has quadrupled and, today, more than 2 million tests are conducted in the United States each year. While the polygraph technique was originally developed as an aid to criminal investigation within the law enforcement community, the vast majority of current examinations involve private sector employment. Employees and applicants in virtually every field of endeavor are being subjected to polygraph tests. Banks and investment firms, mail order houses, discount shops, restaurants, clothing and shoe stores, supermarkets and department stores, hotels, home service companies, and security firms—all use polygraphs for a variety of purposes. Yet, despite the prevalent use of these instruments, there is a disturbing absence of scientific literature supporting or validating the use of the polygraph machine in an employment setting. In fact, there are several reputable studies which indicate that polygraph examinations may be invalid, especially the typical pre-employment and random tests, which currently constitute the bulk of private sector testing.

B. THE POLYGRAPH EXAMINATION

While specific techniques vary, most polygraph tests measure variations in the physiological reactions manifested by a subject in response to questions asked by the examiner. The instrument is designed to measure changes in blood pressure, respiration, and perspiration of the hands, all of which are believed to be sensitive to the psychological state of the subject.

Typically, a sphygmograph similar to the instrument used to take blood pressure is placed around the subject's arm, pneumograph tubes are placed around the chest and abdomen, and electrodes are attached to two fingers of the right hand. Each of these is connected to a pen, which produces a line on a chart, and it is the analysis of this chart which forms the basis as to whether the subject is truthful.

There seems to be little debate over the ability of a polygraph instrument to measure physiological changes but there is no evidence to support that the physiological reactions measured during an examination are unique to deception. In fact, many psychological states, such as anger, fear, anxiety, surprise, uncertainty or resentment can produce a reaction in the physiological system, and there is no way an examiner can conclude beyond a reasonable doubt that the cause of a reaction can only be deception.

It is not surprising then that most experts agree that the polygraph instrument is not a lie detector. No machine can tell with scientific certainty when a lie has been told, yet it is also true that the dramatic increase in the use of the polygraph instrument stems in large part from the instrument's promotion as a detector of deception and those who would deceive. If those who rely on the results of a typical short, private sector polygraph examination were familiar with actual expected accuracy of such tests, it is doubtful that the use of polygraph exams would be increasing.

Despite traditional public perception, most polygraph examiners base their decision not only on the reactions shown on the charts but also on the conduct of the subject during the exam, the natural inclinations of the examiner, and most importantly, confessions made during the examination process. It is disturbing to find how important fear of the machine is to the examination process, and the way in which polygraph examinations have manipulated this fear to elicit a wide variety of statements.

Private sector examination techniques

Most private sector pre-employment examinations utilize a series of relevant-irrelevant questions. A person is asked a series of questions which contain relevant information about the subject matter being tested, which are interspersed among a series of neutral questions. If the physiological reactions are stronger to the relevant questions than to the neutral ones, the person is diagnosed as being deceptive. Conversely, a lack of difference is considered to be an indication of truthfulness.

A second method, the control question technique, is the kind of test most generally used in criminal investigations or in instances which involve a reportable offense. Here, the control questions are deliberately vague, cover a long period of time and involve acts which almost everyone has committed at some time in his or her life. The purpose of this kind of exam is to force an individual to be more concerned with the control questions than with the relevant ones so that the latter will generate a physiological response. The questions are developed, reviewed and refined with the person taking the exam during a lengthy pretest interview.

The results of a control question test are evaluated by a numerical scoring system. If the reactions are stronger to the relevant questions, the individual is diagnosed as being deceptive. Conversely, stronger reactions to control questions are considered indicative of truthfulness.

While the available literature is more supportive of the control question technique than the relevant-irrelevant method, the former is not without its significant problems. Most notably, with a control question technique exam, the inevitable errors are almost always false positive findings. In such cases, an innocent examinee tests positive and is determined by the examiner to be deceptive, despite the fact that the examinee is actually telling the truth. It has been determined that even assuming a 95% degree of accuracy with such tests, in every population of 1,000 examinees, 47 innocent people will be labeled guilty even though they are in fact innocent.

The problems with the relevant-irrelevant exam have been frequently documented. As Dr. Raskin noted in his testimony before the Committee, most people taking such a test quickly deduce that the relevant questions are the only important ones in the exam. Consequently, an innocent person is more likely to react strongly to them and be incorrectly diagnosed as being deceptive. In addition, relevant-irrelevant exams cannot account for individual differences in physiological reactivity and there is no systematic, standardized method for analyzing test results. He concluded by stating that it should not be surprising that the scientific evidence

currently available indicates that the relevant-irrelevant test has a low level of accuracy.

Moreover, unlike the control question test, which is based upon a specific issue or fact situation, the relevant-irrelevant tests tends to be vague and broad, because the examiner is seeking to determine what an employee or prospective employee may do in the future. Also, these examinations are usually much shorter in duration than control question tests, and most experts agree that both factors significantly undercut the potential accuracy of the examination.

The Committee received no reports which indicated that the relevant-irrelevant test is an accurate indicator of deception. Instead, the existing data raises serious doubts about the validity of such tests. Commenting on this fact, the Office of Technology Assessment (OTA) stated in a report published in 1983 that "there is very little research or scientific evidence to establish polygraph test validity in large-scale screening as part of unauthorized disclosure investigations, or in personnel security screening situations, whether they be pre-employment, preclearance, periodic or aperiodic, random, or 'dragnet.' " *(Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum,* Washington, D.C.: U.S. Congress, Office of Technology Assessment, OTA-TM-H-15, November 1983, p. 102).

In testimony before the Committee, Dr. Leonard Saxe, who was the Principal Investigator and Author of the OTA study made the following statement:

> Perhaps the most important research problem relevant to the Committee is that the type of polygraph test most often used in the workplace has received virtually no research attention. There is not a single adequate field study of the validity of using polygraph tests to screen employees. Since there are no scientific data, it is difficult to understand on what research basis anyone could claim its accuracy or appropriateness. The limited research evidence is almost exclusively of control question tests used in specific incidents to assess the truthfulness of criminal suspects. Most often, such research has been done in serious cases such as murder and sexual assault.

Moreover, Mr. F. Lee Bailey, a polygraph advocate of some renown, was asked during the Committee's hearing if the typical exam in the workplace, which is often no more than 15 minutes long, satisfied the requirements of a proper polygraph examination. Mr. Bailey replied that these exams were not polygraph tests, that to call them such was a misnomer. He went on to state that the questions in these short tests tend to be shotgun and provoke responses, the accuracy of which are beyond the examiner's ability to determine. In his view, a complete, responsible, expert polygraph exam would take a minimum of 3 to 4 hours to complete.

C. BUSINESS CONCERNS

The majority of those who testified before the Committee were representatives of businesses and industries who use polygraph ex-

aminations for a variety of employment related purposes. They consider the examination to be an essential safeguard against individuals who lie about their prior work experience, who have a criminal record or who suffer from a drug problem. They also stress the valuable role the polygraph plays in preventing or punishing employee theft and in proving the innocence of a worker suspected to be involved in an improper or illegal act. It is also clear that some employers who support polygraph testing rarely conduct an actual examination. They assert that the simple fact that they can polygraph an employee or applicant is by itself an effective deterrent.

The Committee has serious doubts whether the concerns raised by the business community are sufficiently important to override the known problems with private sector polygraph testing. At the hearing, there was little if any testimony about alternative screening or investigative methods which an employer could use in place of the polygraph examination, but the ability of all types of companies to operate in states which already prohibit such exams is a clear indication that such methods are available. In addition some companies have made a conscious decision not to conduct polygraph examinations and rely instead on more traditional employment practices.

D. ABUSES AND COMPLAINTS

Compounding the absence of scientific studies validating the accuracy of polygraph examinations is the fact that there is a voluminous documented record of abuse of the examination process, and the test results. Examiners and employers have used polygraph examinations to inquire into the personal beliefs of employees or applicants concerning religion, race relations, politics, sexual practices and union and labor organizations. Such inquiries often occur during pre-test interviews when the examiner is setting up the test and allegedly warming up the examinee. The examinee is told that these questions will not be asked when the machine is on, but the answers are then made available to the person requesting the examination. As a result, employers are able to screen applicants for reasons which otherwise would be illegal.

Examiners also have influenced the outcome of an examination by creating a hostile testing environment or simply scaring the examinee during questioning. The case of Mary Braxton, who testified before the Committee, was not atypical. There, after badgering and threatening Ms. Braxton, the examiner offered to stop the test if she would confess to a minor infraction. She refused because she was innocent, but the examiner continued to pressure her, telling her that if she signed the confession nothing would happen. Finally, she relented and signed the false confession and was immediately fired. Prior to the exam, Ms. Braxton had an excellent work record and had been awarded a series of promotions. She sued the examiner and won a judgment against him, but she has been unable to collect because he fled the state.

With increasing frequency, employees and prospective employees have contacted Committee members to voice complaints about abuses in testing and to raise concerns over the validity and gener-

al use of the tests. They find the examination humiliating but feel powerless against the probing of the examiner into their private lives and beliefs. They are afraid, however, to refuse to take an exam for fear of being fired or to the inevitable stigma associated with such a refusal. The need for work or the threat of being fired often overrides the understandable reluctance to participate in a polygraph examination.

The Committee has also received complaints regarding the use of devices such as the Voice Stress Analyzer. These are especially troubling because they are not only extremely inaccurate but also impossible to control. An examinee does not need to be informed that he or she is being tested; instead, the examination can be based on what appears to be an otherwise innocuous phone conversation. Any legitimate attempt to regulate such devices would be impossible.

E. REGULATION

Federal regulation

Under current law, there is no federal regulation of polygraph testing in the private sector except for those few employers who are involved in national security. Those regulations which do exist are extremely stringent and bear little resemblance, if any, to state regulation on polygraph testing. Consequently, the few polygraph examinations permitted under the Department of Defense regulations have little in common with the typical private sector exam.

State regulation

The large increase in the use of polygraph tests in the private sector, and the resulting abuses and complaints have occurred despite an increase in restriction and regulation at the state level. Currently, nine states have no laws governing any aspect of employment polygraph testing, twelve states and the District of Columbia have laws which prohibit most private employers from requiring or requesting that a polygraph test be taken as a condition of employment, ten states prohibit most private employers from requiring an examination but allow employers to request such an exam, and the remaining states have enacted laws which either license polygraph examiners or regulate the use of polygraph examinations, and in some instances do both. The statutes and regulations in the states that allow polygraph examinations vary widely regarding the questions that may be asked, the rights of the employees who are tested, and the kind of training required for licensing.

Given the absence of uniform standards, it has been easy for employers and examiners to circumvent state restrictions. For example, applicants for work in a state which prohibits polygraph testing have been asked to submit to polygraph tests in a neighboring state that has more lenient standards. This is especially true in large metropolitan areas, which have common borders with more than one state.

Furthermore, because of the variety of laws that exist, employees are often confused or ignorant as to the rights they may enjoy in any given jurisdiction. For example, an employee of a convenience

store chain in the District of Columbia could not be asked to take a polygraph examination. If that same employee was transferred to a Virginia branch of the same chain, he or she could be fired for refusing an order or request to take an examination. In Maryland, where an employee cannot be required to take an examination and there are no licensing requirements for polygraph examiners, the same employee could be asked questions which are prohibited in Virginia. These widely disparate circumstances could occur under existing state law at branch offices of the same business, and these branches could be within a ten mile radius of one another.

In addition, state "regulation" is often a misnomer. For example, the Committee learned of the experience of Mr. Lawrence Bunce, of Macon, Georgia, who filed a complaint on March 17, 1986, with the Georgia State Board of Polygraph Examiners. The Georgia State law has been touted as the finest state regulatory law in the country. Mr. Bunce's repeated requests for an investigation were apparently ignored until his case was mentioned during the Senate hearing. Following the hearing, Mr. Bunce received a letter on April 25, 1986, informing him that his complaint had been dismissed after the State Board determined it lacked jurisdiction over his case.

The Committee was called the day after the hearing by a Board Staff member asserting quite emphatically that the test given Mr. Bunce was not a polygraph examination. Several days later, the Committee received a letter from the Georgia Board stating that Mr. Bunce had never filed a complaint. Finally, on June 17, 1986, despite all that had gone on before, Mr. Bunce was interviewed by an investigator from the Georgia Board. The utter confusion over the handling of Mr. Bunce's complaint is particularly telling since the Board receives an average of only two complaints a month. And, this low number of complaints is often used as evidence as to the effectiveness of the Georgia State law.

The Committee also received testimony that states appear reluctant to enforce their own laws. Examples were given of failure to develop policies and procedures for handling complaints, a lack of public access to the enforcement agency, and a lack of public information regarding the availability of state assistance in investigating complaints of polygraph use and abuse.

In addition, there is also a marked difference in the number of complaints allegedly generated by polygraph examinations. In 1985, the American Civil Liberties Union (ACLU) reported that its offices received over 1,800 complaints on polygraph examinations, while the 27 state polygraph boards reported a total of only 145 complaints. The ACLU also reports that a survey of states which license polygraph examiners revealed that only two states have ever revoked an examiner's license and only five states could ever recall suspending a license.

Industry regulation

There currently exist several professional associations of polygraph examiners, the largest being the American Polygraph Association. These associations have established guidelines and recommended procedures for their members and in many cases have required compliance with these guidelines in order to maintain

standing. Nonetheless, membership in these organizations and compliance with their guidelines are not required in order to administer polygraph examinations. Today's self-regulation has been generally ineffective. In fact, in his testimony before the Committee, Mr. William Scheve, Jr., President of the American Polygraph Association, while not agreeing with the proposed ban on polygraph testing, did state that most polygraph examiners would view federal guidelines as a welcome improvement.

F. CONGRESSIONAL ACTION

The problems with private sector polygraph examinations in the United States have been brought to the attention of Congress repeatedly over the last several years. Legitimate concerns have been raised concerning the absence of scientific data validating the accuracy of polygraph testing, the record of examiner and employer abuse of the exam, and the varied record of local enforcement methods. The overwhelming majority of those who have testified before the Committee have acknowledged the serious problems with the current use of such examinations and have agreed that some collective action is needed. Unfortunately, there has not been a corresponding consensus on how to solve these problems.

H.R. 1524

H.R. 1524, which the House of Representatives passed on March 12, 1986, is similar to S. 1815 in that it too would ban the use of polygraph testing in the private sector. Neither bill addresses testing by local, state or federal government. They differ, however, in that the House bill would exempt the drug industry, the security services industry, the public utilities industry, the children's day care industry, and the nursing home industry. S. 1815 contains no such exemptions.

The fundamental problem with polygraph examinations is the lack of accuracy of the examination itself, a problem which is not satisfactorily resolved simply because the job at issue is with a nursing home as opposed to a department store. S. 1815 is premised on the presumption that a better solution may be one which would treat all employers in the same manner. To do otherwise would place Congress in the impossible role of choosing among equals, forcing it to fashion a policy to accommodate those industries or services who were able to win an exemption.

G. STATES RIGHTS ARGUMENT

Throughout Committee consideration of this bill it has been argued that S. 1815 violates the 10th amendment of the Constitution by attempting to regulate issues reserved to the States. Advocates of this position maintain that there is nothing involved in polygraph testing that would subject it to federal control under any provision of the United States Constitution and that given state regulation, federal pre-emption is inappropriate.

The Department of Justice asserted in its testimony before the Committee that passage of the bill would violate the structure established by the framers of the Constitution to apportion power between the national and state governments. The Department

claimed that there is no need for national enforcement or uniformity with respect to polygraph use, that the benefits of leaving regulation to the states are evident, and that regulation is a complex issue in which a substantial number of reasonable responses are available. According to the Department, S. 1815 would do violence to an important underlying principle of our union—the belief in the ability and responsibility of the states generally to govern the affairs of their citizens.

The position of the Department is troubling for several reasons. First, it assumes incorrectly that Congress cannot preempt state law in the area of labor relations. In fact, most of the important aspects of labor relations have, over the last 50 years, become subject to federal statutory law. The National Labor Relations Act of 1935, the Fair Labor Standards Act of 1938, the Labor-Management Reporting and Disclosure Act of 1959, the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Occupational Safety and Health Act of 1970, and the Rehabilitation Act of 1973 are just a few of the labor statutes enacted by Congress which have pre-empted state labor law.

Second, the test proffered by the Department of Justice is so stringent that it is doubtful whether any current federal labor law or civil rights statute would satisfy its standards. If applied literally, it would appear to preclude congressional involvement not only in the area of polygraph testing but also in every employment practice currently regulated by the federal government. Congress, on the other hand, has consistently moved in the other direction, and it is difficult to imagine an employment issue other than polygraph testing that is still beyond the purview of federal control.

Since the 1940's the U.S. Supreme Court has broadly defined interstate commerce, consistently ruling that Congress has virtually unlimited authority to enact legislation in the labor context. See *United States* v. *Darby*, 312 U.S. 100 (1941); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). As Justice Stevens said in a recent decision: "Today, there should be universal agreement on the proposition that Congress has ample power to regulate the terms and conditions of employment throughout the economy." Concurring opinion, *EEOC* v. *Wyoming*, 460 U.S. 226, 248 (1983).

It is interesting to note that during the testimony presented on behalf of the U.S. Department of Justice, the Department's witness admitted that its opposition to S. 1815 would be "considerably diminished" if it could be shown that private employers were crossing state lines to avoid complying with polygraph bans in the states where they operate. In fact, employer use of this deplorable practice is well documented.

Finally, the Department's position would have us ignore the one fact on which there seems to be a consensus of opinion—existing state restrictions and regulations have neither stopped or curtailed polygraph abuse. It should be clear that there is a demonstrated need for uniform, national enforcement. The experience of the last ten years has shown most vividly that state statutes, such as they are, have provided little effective protection for working men and women against those who intentionally misuse the polygraph instrument. To argue that the states can and are providing the best

solution to polygraph abuse is tantamount to arguing that Congress should continue to ignore this pervasive problem.

H. CONCLUSION

In summary, the reliance placed on the polygraph machine by private sector employers to make important employment decisions affecting the careers and welfare of workers throughout this country is misplaced and unwarranted. Polygraph examinations are by no means an infallible method for detecting lies or liars. At best, all they might provide is an indication that a person may be deceptive.

The Committee found no reliable scientific study validating the accuracy of the typical polygraph examination being given in the private sector. Instead, the data that was submitted to the Committee supported serious concerns about the use of the polygraph instrument for employment purposes. Moreover, the Committee found there to be a significant difference between the polygraph examination being conducted by the federal government and the typical private sector test, which is usually less than a half an hour in length.

It is also the view of the Committee that employers and polygraph examiners are abusing the polygraph examination, manipulating the test process, and using inaccurate or unfounded results to justify employment decisions which otherwise would be suspect. While this abuse is not true of all employers or examiners, it is sufficiently extensive to warrant congressional action. Employees and applicants throughout this country are being unjustly terminated or denied employment not due to their own shortcomings but due to intentional and unintentional misuse of the polygraph exam and to the inherent inaccuracies of the current testing process. An individual should be judged on the basis of his or her own ability, skills and record and should not be summarily condemned or classified by unproven accusations and assumptions.

The Committee also found that the current array of state laws and regulations is incapable of curtailing abuse and can be readily circumvented. State prohibitions and regulations often are not enforced, and those who do violate the law often go unpunished. The existing regulatory system simply does not work.

The numerous employer organizations that testified before the Committee made clear the importance their members place on the polygraph examination. According to these business representatives, they feel the machine has proven effective in their efforts to identify prospective employees who have lied on their applications, have a criminal record or suffer from a drug problem. While these concerns are most serious, it is not clear that the current use of the polygraph examination is the most effective or equitable solution, especially given its noted shortcomings. Moreover, businesses and industries in states which already ban polygraph testing, such as Massachusetts and Connecticut, suffer no apparent disadvantage when compared to their counterparts in states where such testing is permitted.

Finally, it is the view of this Committee that S. 1815 is not only permissible under the Constitution and consistent with the tradi-

tional role exercised by Congress over the last fifty years to protect working men and women in this country but also is an appropriate and necessary response to the problems described above.

IV. Hearing

The Committee on Labor and Human Resources held a public hearing on April 23, 1986, to consider S. 1815. The following persons and organizations appeared as witnesses and presented oral and written testimony:

The Honorable Chic Hecht, Senator.

The Honorable Pat Williams, Member of Congress.

The Honorable Stewart McKinney, Member of Congress.

Mr. Steve Markman, Assistant Attorney General for Legal Policy, Department of Justice.

Dr. David C. Raskin, Professor of Psychology, University of Utah.

Ms. Mary Braxton.

Mr. William H. Wynn, President of the International Food and Commercial Workers Union.

Mr. F. Lee Bailey.

Dr. Leonard Saxe, Associate Professor, Boston University.

Mr. Lawrence W. Talley, Chairman of the Georgia State Board of Polygraph Examiners.

Mr. William Scheve, Jr., President of the American Polygraph Association.

Mr. Herb Matthews, President of Benton Brothers Film Express on behalf of the American Trucking Association.

Mr. Donald Zale, Chairman of the Zale Corporation, also on behalf of the Jewelers of America, the Manufacturing Jewelers and Silversmiths of America, the American Watch Association, the American Retail Federation, the National Retail Merchants Association and the National Mass Retailing Institute.

Mr. Robert A. Ostrovsky, Director of Industrial Relations for the MGM Grand Hotel and Casino, on behalf of the Gaming Industry of Nevada and the Nevada Resort Association.

The following persons and organizations provided written testimony for the record:

The Honorable Bill McCollum, Member of Congress
American Bankers Association
American Pharmaceutical Association
American Retail Federation
American Psychological Association
American Society for Industrial Security
Association of General Merchandise Chains, Inc.
Barland & Associates
Borg-Warner Corporation
Bowling Proprietors' Association of America
"Bugs" Burger Bug Killers, Inc.
Building Service Contractors Association International
John L. Burnett
Coin Depot Corporation
Designer Jewels, Inc.
Faraday National Corporation
Food Marketing Institute

Florida Department of State
Harper Trucking Company
Hi-Line Electric Company
Hotel Employees & Restaurant Employees International Union
Indiana Polygraph & Stress Analysts Association
International Brotherhood of Electrical Workers
International Brotherhood of Teamsters
John M. Stone Company
Lauland Security Consultants
David F. Linowes
Michael G. Lloyd
Marine Midland Bank, N.A.
Willafay McKenna
Motorola Incorporated
Multi-Housing Laundry Association
National Apartment Association
National Association of Catalog Showroom Merchandisers
National Association of Chain Drug Stores, Inc.
National Association of Convenience Stores
National Association of Retail Dealers of America
National Automatic Merchandising Association
National Grocers Association
National Retail Merchants Association
National Small Business Association
National Wholesale Druggists' Association
Nevada Attorney General's Office
New York Clearing House
Orkin Pest Control
Petroleum Marketers Association of America
Polygraph Personnel Research Inc.
Rollins Incorporated
Dr. Bernard Schermann
Securities and Exchange Commission
Securities Industry Association
Service Employees International Union
Small Business Legislative Council
Society of Independent Gasoline Marketers of America
Utility Workers Union of America
Wedlo, Incorporated.

V. Cost Estimates

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 19, 1986.

Hon. Orrin G. Hatch,
Chairman, Committee on Labor and Human Resources, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1815, the Polygraph Protection Act of 1985, as ordered reported by the Senate Committee on Labor and Human Resources, June 25, 1986.

This bill outlaws the use of polygraph tests by private employers on any employee, agent, prospective employee, or prospective

agent. The Secretary of Labor is directed to distribute a notice that employers are prohibited from using lie detector tests, to issue rules and regulations, and to enforce the provisions of this act. No significant costs to the federal government, and no cost to state or local governments is expected to be incurred as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

C.G. NUCKOLS,
(For Rudolph G. Penner, Director).

VI. REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 1815 is made:

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

It is estimated that S. 1815 would regulate nearly every private business and its employees and potential employees, or approximately 5.5 million businesses and 92 million employees or potential employees. Those not regulated would be employees in the public sector and those businesses and employees with contracts with the Department of Defense who have access to classified information.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

The bill would probably increase job stability for private sector employees and could potentially raise costs for internal security and employment background investigations for businesses, thereby raise the costs of products and services for consumers.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

This bill would prohibit an employer from using a lie detector to investigate a current or potential employee's personal background, thereby reducing the employer's access to the person's history, especially in cases where the lie detector test is used to elicit confessions.

D. ADDITIONAL PAPERWORK, TIME AND COSTS

S. 1815 would result in additional paperwork, time and costs to the Department of Labor, which would be entrusted with implementation and enforcement of the Act. The bill could also result in additional time and cost to businesses by necessitating different forms of employee background investigation and monitoring.

VII. Section-by-Section Analysis

SECTION 1—SHORT TITLE

Under section 1, the short title of S. 1815 is the Polygraph Protection Act of 1985.

SECTION 2—PURPOSE

Under Section 2 of the bill, the purpose of the Act would be to prevent the denial of employment based on the use of lie detectors. This section would construe the Act to prohibit the use of all lie detectors on any employee, agent, prospective employee or prospective agent.

SECTION 3—PROHIBITION ON LIE DETECTOR USE

Section 3 of the bill would prohibit an employer, his agent, or his representative from requiring, requesting, suggesting, permitting, or causing any employee, agent, prospective employee, or prospective agent from taking or submitting to any lie detector test for any purpose. This section would prohibit an employer from using, accepting, or referring to the results of any lie detector test of any employee, agent, prospective employee, or prospective agent. This section would also prohibit any employer from discharging, dismissing, disciplining, or denying employment to any person; or threatening to take such action against any person; for refusing, declining, or failing to take any lie detector test.

SECTION 4—NOTICE OF PROTECTION

Section 4 would require the Secretary of Labor to prepare and post, in conspicuous places upon the premises of all employers engaged in any business affecting interstate commerce, a printed notice setting forth the information necessary to carry out the purpose of the Act.

SECTION 5—RULES AND REGULATIONS

Section 5 would require the Secretary of Labor to promulgate rules and regulations, as necessary, to carry out the Act.

SECTION 6—AUTHORITY OF THE SECRETARY OF LABOR

Section 6 would require the Secretary of Labor to take all actions necessary to carry out the functions of the Act. He would be required to cooperate with all regional, State, local, and other agencies and provide technical assistance to employers, labor organizations, and employment agencies in carrying out the purposes of the Act. He would also be required under this section to make investigations and keep appropriate records in administering this Act in accordance with the powers and procedures provided in section 9 and 11 of the Fair Labor Standards Act of 1938.

SECTION 7—ENFORCEMENT PROVISIONS

Section 7 of the bill would require the Act to be enforced in accordance with sections 11(b), 16 and 17 of the Fair Labor Standards

Act of 1938. Amounts owing an individual under this Act would be treated as unpaid minimum wages or overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938.

SECTION 8—EXEMPTIONS

Section 8 would exempt from the Act all employees of the federal, state, and local governments and any political subdivision thereof. It would also exempt personnel of contractors of the Department of Defense with access to classified information.

SECTION 9—DEFINITIONS

Section 9 would define "person" to mean any natural person, firm, association, partnership, corporation, or any employee or agent thereof. This section would define "lie detector" to include, but not be limited to, any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device which is used for the purpose of verifying the truth of statements. This section would also define "employer" as including an employment agency.

SECTION 10—EFFECTIVE DATE

Section 10 would establish the effective date for all provisions, except section 4, as the date of enactment. Section 4 would become effective six months after the date of enactment.

VIII. Changes in Existing Law

In accordance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, it is noted that S. 1815 is a free-standing bill and makes no changes in existing Federal law.

IX. Committee Action

The Committee on Labor and Human Resources met on May 20, 1986, June 18, 1986, and June 25, 1986, to consider S. 1815, the Polygraph Protection Act of 1985.

On June 18, 1986, the Committee considered an amendment, introduced by Senator Wallop for Senator Hecht, which would have exempted employees or prospective employees in the gaming industry (casinos and resorts in states where gambling is permitted by law) from the effects of the Act. By a rollcall vote of 11 to 5, the Committee agreed to table the amendment:

YEAS	NAYS
Hatch	Quayle
Stafford	Nickles
Weicker	Hawkins
Grassley	Thurmond
Kennedy	Wallop
Pell	
Metzenbaum	
Matsunaga	
Dodd	

Simon
Kerry

Also on June 18, 1986, the Committee considered an amendment, introduced by Senator Wallop, in the form of an alternate bill, which would have set minimum standards for the administration of polygraph examinations and encouraged the States and local governments to establish programs regulating the administration of polygraph examinations in accordance with such standards, instead of banning the total use of lie detector tests in the private industry. By a rollcall vote of 10 to 6, the Committee agreed to table the amendment:

YEAS	NAYS
Hatch	Quayle
Stafford	Nickles
Weicker	Hawkins
Kennedy	Thurmond
Pell	Wallop
Metzenbaum	Grassley
Matsunaga	
Dodd	
Simon	
Kerry	

On June 25, 1986, the Committee considered a motion to order the bill reported without amendment. By a rollcall vote of 11 to 5, the Committee agreed to the motion:

YEAS	NAYS
Hatch	Quayle
Stafford	Nickles
Weicker	Hawkins
Grassley	Thurmond
Kennedy	Wallop
Pell	
Metzenbaum	
Matsunaga	
Dodd	
Simon	
Kerry	

ADDITIONAL VIEWS OF SENATOR DAN QUAYLE

S. 1815 would prohibit the use of polygraphs as a condition of employment. I oppose this bill, not because of any belief in the validity of the polygraph examination, but because it would herald a fundadmental change in federal-state relations in regarding conditions of employment.

Presently, labor-management agreements and state law govern all questions of hiring and discharge except that federal law prohibits discrimination in employment because of race, creed, color, national origin, handicap, union membership or religion—and this is wise. Discrimination in employment is an overriding national concern appropriate for Federal legislation.

States have enacted a plethora of legislation dealing with the hiring/firing process both through specific enactments against particular abuses and through statutory and case law requirements of "just cause" for discharge.

States have enacted laws prohibiting employers from soliciting certain information from prospective employees about their criminal records and drug use; regulating whether employees can be discharged for being summoned to perform jury duty, for being a whistleblower, for filing a workers' compensation claim, for temporary disability due to accident or illness, for refusing to be sterilized, for serving in the reserves of the Armed Forces, for being in the National Guard, for being a volunteer fireman.

Some states have also enacted laws which exceed the standards set by the federal government. For example, the District of Columbia has the most far reaching anti-discrimination statute. Thirteen kinds of discrimination are specifically prohibited by D.C. law including physical appearance, matriculation, sexual preference and political affiliation.

Furthermore, many states regulate testing and licensing of polygraphers. The District of Columbia has joined with nineteen other states in regulating the use of polygraphs for employment purposes. Some states simply ban the use of the tool. Others mix a partial ban, with exemptions for police officers and certain limited groups of others. Of the remaining states that do not regulate the use of polygraphs in employment, thirteen regulate polygraph examiners. Just like state laws which protect workers in other instances, state polygraph statutes were developed because the citizens and their elected officials determined that these laws were in the public interest.

The states have clearly demonstrated their ability to regulate many aspects of the employment relationship. The states can regulate—or choose not to, depending on the will of their citizens.

Some of S. 1815's supporters contend that labor law is already so heavily federalized that a bill extending federal control to the use of the polygraph for employment purposes does little to disturb the

principles of federalism. This is just not so. Federal law has so far avoided the issue of prohibited practices in hiring and firing—except for the overriding Federal concerns against discrimination.

The report of the majority contends that the Constitution does not prohibit Congress from legislating in this area. I agree that it is Constitutional for Congress to legislate. The real issue is not whether the Congress may legislate, but whether it is wise to do so. I believe that it is unwise for Congress to undertake the task of regulating the many aspects of the employment process, and it is pellucidly clear to me that this bill is the beginning of such a trend.

Other supporters say this bill is needed to protect working men and women against unfair employment practices. However, we already know that the unions can bargain collectively on the use of polygraphs, and many have. I know of no reason why the Federal government should thrust its intrusive hand into the internal workings of labor and management. If the unions oppose the use of polygraphs, they should bargain accordingly. The Master Freight Agreement which the Teamsters have negotiated with the trucking employers already permits the use of pre-employment polygraphs, but not after the employee is hired. In addition, the United Food and Commercial Workers Union testified that some of its agreements with national chain grocery stores prohibit the use of polygraphs. Doubtless, other unions have bargained on this issue.

Prohibition of polygraphs may seem a small step, but it crosses a significant boundary. If we take this step we will immediately be confronted with other "unfair" practices in hiring and firing—a slippery slope that will bring us Federal law on "just cause" for discharge and "objective standards" for all hiring decisions. I would rather leave those matters to collective bargaining agreements and to the States.

DAN QUAYLE.

ADDITIONAL VIEWS OF SENATORS THURMOND, NICKLES, HAWKINS, AND WALLOP

We oppose enactment of S. 1815, which we believe violates principles of both the free market and federalism. The bill would create a federal prohibition on the use of a polygraph, or similar examination, by any private-sector employer not connected with highly classified Department of Defense work. However, local, state and federal governments would continue to be at liberty to administer polygraph examinations to employees and job applicants subject to their own laws and regulations.

By federalizing the polygraph field, the bill would preempt statutes enacted in thirty-four states and the District of Columbia, regulating the use of polygraphs and other "honesty" tests. One stroke of the legislative pen would override the judgment of elected representatives throughout the United States, and would pronounce the view from Washington that the state governments are incapable of governing the affairs of their citizens.

It is ironic, that on June 26, 1986—the day after S. 1815 was approved by the Labor Committee—the Senate passed the Conference Report to H.R. 4515, the Urgent Supplemental Appropriations bill. The Urgent Supplemental includes, among other things, a temporary waiver on polygraph examination limitations for the Defense Department. While our colleagues propose to prohibit the use of polygraphs by the private sector, its use will be expanded by the Department of Defense.

The regulation of polygraph use in the private sector is tantamount to regulation of hiring and firing practices. We believe that the federal government should not regulate these practices, with the exception of discrimination. It is a matter of federal law, the Constitutional validity of which emanates from the Commerce Clause, that employers may not discriminate in any area of employment: in recruiting, pre-employment, hiring, promotion, layoff or firing. However, the federal government should not reach into other areas of employment such as regulation or prohibition on the use of "honesty" tests. Under the 10th Amendment to the Constitution, this power has been reserved to the states.

The attempt to create a federal rule in this area has implications far beyond polygraph regulation. It is symptomatic of the persistent tendency of government officials in Washington to act as if only the federal government can respond to problems facing the residents of the fifty states. The effect has been that the size and cost of the federal government has increased dramatically, and has undertaken rsponsibilities that it cannot manage. More importantly, this continuing accretion of power to the federal government interferes with the decisions of private citizens and the levels of government closest to those citizens. Under our system of powers delegated to the federal government, not every problem has a fed-

eral solution. If a federal solution is desired, but not found in the Constitution, the Constitution can be amended. The amendment process allows the people to decide what the role of the federal government should be. A continuing debate on the proper role of the federal government is healthy for the democratic process.

It is perhaps understandable that, officials who believe that their public policy positions are beneficial, will want all people to benefit from those decisions, and will want them imposed on all fifty states uniformly. However, this centralizing tendency has resulted in placing the greatest share of authority in the federal government and less and less authority with state and local governments. Centralization further reduces the efficacy of the system of checks and balances that our Founding Fathers put in place to avoid the coalesence of absolute power in either state or federal government or in any branch of the federal government.

The Constitution deliberately apportions power between the national and state governments. The intent of this Constitutional framework continues to be relevant today. This apportionment of power will be dispersed and limited. State governments, being closer to the people, are in a better position to be responsive and accountable to the needs of their citizens.

Citizens of the various states are in a better position to be directly involved in setting the direction of their government. The wide range of polygraph regulation already adopted, as well as the choice of some states not to regulate, illustrate how the political process produces varying outcomes according to the sentiments of different constituencies. This diversity fosters experimentation, permitting different regulatory approaches to be compared and contrasted in search of the most effective solutions. For polygraph regulation, where even the scientific and technological questions, much less the political and social ones, have no definitive answers, this diversity and experimentation is especially desirable. By forcing the states to accept a federal solution to polygraph regulation, our colleagues who support S. 1815 would ignore their responsibility to protect the powers of the states they represent.

The considerable body of state laws regulating the polygraph attests to the ability and willingness of state governments to deal with the problems giving rise to S. 1815. Nineteen states and the District of Columbia regulate the use of polygraphs for employment purposes. Some states have enacted legislation similar to S. 1815 and barred private employers from using the polygraph. Other states ban the compulsory use of the device but permit its use if the employee voluntarily agrees. Still others combine a general ban on polygraph usage with exemptions for certain occupations, ranging from police and firefighters to jewelers and employees of the pharmaceutical industry. Six of these states also regulate polygraph examiners. Of the remaining states that do not directly regulate the use of the polygraph by employers, thirteen regulate polygraph examiners—some requiring licensing, and some limiting the types of questions that employees can be asked.

This diversity of existing state laws is both healthy and desirable on an issue as contentious and unsettled as polygraph examinations. The current debate on the reliability and appropriateness of using the polygraph for employment purposes is an ongoing and

various one in which few definitive answers are available. Moreover, any type of polygraph regulation requires a careful balancing of the interests of consumers, employees, employers, and others. There are endless possibilities for how that balance can be struck. The variety of approaches adopted by the jurisdictions that have enacted polygraph regulation, and the myraid approaches that might be adopted by other states in the future, demonstrate that the American citizens, through their elected state representatives, have chosen to answer questions about the polygraph and to balance the interests at hand in diverse ways.

It is precisely this type of diversity that our principles of federalism are meant to preserve. By ignoring those principles, S. 1815 threatens to stifle that diversity and to do great damage to our constitutional system. Federalism is not just a matter of "states' rights," but rather the principle that certain functions of government are more properly performed at the state level, while others are more appropriate for national control. Through the Tenth Amendment and a system of enumerated national powers, federalism embodies the idea that the states have the ability and responsibility to govern their own affairs in certain areas.

S. 1815 would override these state laws and regulations in the name of regulating interstate commerce. The Commerce Clause has been invoked in nearly every imaginable context to usurp power from the states and concentrate it in Washington. With power closer to the people, our Founding Fathers sought to encourage greater public participation in government.

The majority argues that Congress has, through the Commerce Clause, virtually unlimited authority under Supreme Court decisions to enact legislation in the labor field. However, the proper interpretation of the Constitution is a subject upon which reasonable men may reasonably disagree. As members of a coordinate and equal branch of government, we are often called upon to exercise our judgment in matters concerning the Constitution.

When issues of federalism are involved, Congressional responsibility takes on added dimensions. Congress must be the guardian of these principles and protect the power of the states. As the Supreme Court recently observed in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005, 1020 (1985):

> [W]e continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress authority under the commerce clause must reflect that position. But power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action.

In other words, the burden of protecting the values of federalism in the commerce context lies with the Members of Congress. As representatives, not only of the citizens of the states, but of the states themselves, it is the Congress that is principally vested with the responsibility to preserve the prerogatives of the states within the constitutional structure.

It is our view that the effect on interstate commerce arising from polygraph examinations may not provide a sufficient Constitution-

al predicate upon which to preempt state laws. Furthermore, even if such a predicate were established, it would not necessarily follow that Congress should regulate polygraphs.

Our colleagues must bear in mind that labor law is not completely controlled by federal statutes. To assert otherwise would ignore the significant range of labor issues that are not subject to federal control. Workers compensation, for example, is subject to state control, and wide variety of compensation rates and schemes have been adopted to meet the needs of the individual states. Most of the issues between employers and employees—the "terms and conditions of employment"—are left to negotiation between the employer and the employee. Thus, simply by classifying this as a "labor law" matter, does not mean that it is appropriate for federal regulation.

In sum, we oppose enactment of S. 1815. To prohibit totally the use of polygraphs in the private sector would overturn the work of more than thirty states in this area and further the accretion of power in the federal government. As members of Congress, the burden of protecting the values of federalism lies with us. Accordingly, we oppose this legislation.

STROM THURMOND.
DON NICKLES.
PAULA HAWKINS.
MALCOLM WALLOP.

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